IN THE SUPREME COURT OF MISSOURI

No. SC85740

STATE OF MISSOURI *ex rel.*
ST. LOUIS COUNTY, MISSOURI, *et al.*,
Relators

vs.

THE HON. DAVID LEE VINCENT, III,
Judge, Circuit Court of St. Louis County, Missouri,
Respondent

BRIEF OF RESPONDENT

Petition for Writ of Prohibition

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STATEMENT OF FACTS

Plaintiff Investors Title Company, Inc. ("Investors Title") filed an nine count First Amended Petition ("Amended Petition") against Relators St. Louis County, Missouri ("County"); Janice Hammonds, Recorder of Deeds for County (the "Recorder"); and Norris Acker, Director of Revenue for County (the "Director"; County, Recorder and Director will be collectively referred to as "Relators"); seeking to recover monies Relators charged in excess of the statutorily-authorized fees for services rendered, over at least a five year period, in conjunction with the filing and recording of documents with, and the receipt of services provided by, the Recorder's Office. [Relators' App. at A1-A17] Investors Title claims that the overcharges were caused by practices and procedures established by Relators which Investors was required to follow. [*Id.* at A3-A4]

The nine causes of action pled by Investors Title are as follows:

Count I - Declaratory Judgment and Common Law Refund;

Count II - Breach of Contract;

Count III - Declaratory Judgment for the Establishment of Prepaid Accounts;

Count IV - Neglect of Duty;

Count V- Due Process claim under 42 U.S.C. §1983;

Count VI - RESPA claim Under 42 U.S.C. §1983;

Count VII - Equal Protection claim Under 42 U.S.C. §1983;

Count VIII - Negligence; and

Count IX - Conversion.

[Relators' App. at A7-A17]

Recognizing that Relators are governmental entities, the torts pled in Counts VIII and IX allege a waiver of sovereign immunity on the basis of insurance coverage under §537.600 RSMo.

Although Relators have admitted publicly, and in other contexts, that they overcharged Investors Title, Relators responded to Investors Title's initial Petition and its Amended Petition with an unending series of motions to dismiss, for summary judgment, and for judgment on the pleadings, all seeking to disclaim any obligation to return the overcharged amounts to Investors Title. [*See* Relators' App. at A18-A22, A34-A35; Relators' Petition for Writ of Prohibition ("Relators' Petition") at ¶¶4-10, and Exhibits referred therein] Moreover, these various motions raised virtually identical arguments to those previously rejected by Respondent, the Honorable David Lee Vincent, III, Circuit Judge, Circuit Court of St. Louis County, Missouri, including the sovereign immunity defense asserted by Relators in this Writ of Prohibition ("Writ"). [Relators' App. at A19-20, A22, A34, A36] In ruling on Relators' motion to dismiss or for summary judgment, Respondent granted summary judgment in favor of Relators as to Counts II, III, IV, VIII and IX of the Amended Petition, and denied Relators' motion to dismiss "as moot". [Relators' App. at A22] Respondent's various orders permitted Investors Title to proceed to trial on the Declaratory Judgment and Common Law Refund claim (alleged in the challenged Count I of the Amended Petition), and on the federal civil rights claims alleged in Counts V, VI

and VII of the Amended Petition. [Relators' Brief at p. 10; Relators' App. at A22, A36]

The final dispositive motion filed by Relators was a Motion for Judgment on the Pleadings filed on or about November 3, 2003. [Relators' App. At A34-35] Following argument, Judge Vincent denied the Motion. [Relators' App. At A36] The concise ruling of the trial court can be stated in full:

> The Court, being advised in the premises, finds that Count I of Plaintiff's First Amended Petition alleges a contractual type relationship between Plaintiffs for money had and received. The Defendants claim in their motion that, *inter alia*, Count I of the First Amended Petition is barred by the doctrine of sovereign immunity. However, an action for money had and received is contractual in nature and thus not barred by the doctrine of sovereign immunity. *Palo v. Strangler*, 943 S.W. 2d. 683, 685 (Mo. App. E.D. 1997). Therefore, Defendants' Motion for Judgment on the Pleadings is overruled and denied.

[Relators' App. at A36]

Relators then filed this original Writ from the denial of the Motion for Judgment or the Pleadings, seeking to prohibit Respondent from proceeding to trial on Count I of the Amended Petition. [Relators' Brief at p. 4] Relators do not seek, however, and have not sought, to prohibit Respondent from proceeding to trial on Counts V, VI or VII of the Amended Petition. [Relators' Brief at p. 10]

POINTS RELIED ON

I. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM EXERCISING JURISDICTION OVER COUNT I.

A. Relators Will Not Avoid Trial by the Granting of the Writ.

State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n, 969 S.W.2d 218 (Mo. banc 1998)

Kinsley v. Missouri, 448 S.W.2d 890 (Mo. 1970)

State ex rel. Less v. O'Brien, 814 S.W.2d 2 (Mo. App. E.D. 1991)

B. Relators Do Not Have Sovereign Immunity from Claims for the Refund of Fees Charged for Services Provided by a Governmental Entity.

Palo v. Stangler, 943 S.W.2d 683 (Mo. App. E.D. 1997)

Reidy Terminal v. Director of Revenue, 898 S.W.2d 540 (Mo. banc 1995)

Gavan v. Madison Memorial Hospital, 700 S.W. 2d 124 (Mo. App. E.D. 1985)

V.S. DiCarlo Constr. Co. v. State of Missouri, 485 S.W.2d 52 (Mo. 1972)

C. Assuming, *Arguendo*, That this Court Finds That Sovereign Immunity Currently Bars Count I of Investors Title's First Amended Petition, this Court Should Abrogate That Judicially-created Doctrine with Respect to Claims for Refunds of Overpayments Fees Paid for Services Provided by Governmental Entities Because the Policy Rationales Originally Supporting the Creation of

Such Immunity No Longer Apply.

Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. banc 1977)

O'Dell v. School Dist. of Independence, 521 S.W.2d 403 (Mo. banc 1975)

State ex rel. Division of Motor Carriers & R.R. Safety v. Russell,

91 S.W.3d 612 (Mo. banc 2002)

SUMMARY OF ARGUMENT

Prohibition is not appropriate in this case because it will not allow Relators to avoid a trial on the claims of Plaintiff Investors Title. Regardless of any ruling by this Court, Relators will face a trial on three federal civil rights claims which involve the same factual issues raised in the claim for which Relators seek sovereign immunity. Furthermore, depending upon the judgment rendered by the trial court, the issues raised by Relator's Petition may not need to be addressed, or could be raised on appeal without detriment.

Moreover, Relators are not entitled to sovereign immunity, in any event. Under the precedent of this and other courts of this State, sovereign immunity does not apply to claims sounding in contract. Alternatively, sovereign immunity does not bar the refund of the overpayment of fees. Accordingly, the Preliminary Writ in Prohibition should be quashed and this case should be remanded for trial on all remaining counts.

Finally, assuming, *arguendo*, that sovereign immunity does bar the claim of Investors Title, this Court should abrogate the doctrine for the recovery of overpayments of fees charged for the provision of services provided by governmental entities.

ARGUMENT

I. REALTORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM EXERCISING JURISDICTION OVER COUNT I.

A. **Prohibition Is Not Appropriate in this Case Because Relators Will Not Avoid Trial by the Granting of the Writ.**

Relators seek a Writ of Prohibition to prevent Respondent from proceeding to trial on one of the four remaining counts in Investors Title's Amended Petition. [Relators' Brief at pp. 4, 6, 10] As this Court has stated,

> prohibition is an extraordinary remedy to correct and prevent the exercise of extrajurisdictional power, is not a writ of right and should not be employed for correction of alleged or anticipated judicial errors, and does not lie for grievances which may be adequately redressed in the ordinary course of judicial proceedings.

Kinsley v. State of Missouri, 448 S.W.2d 890, 892 (Mo. 1970).

Moreover, because Relators have the burden of establishing that "lack of jurisdiction and lack of an adequate remedy by appeal", courts will not grant a writ of prohibition "unless an act in excess of jurisdiction is clearly evident and the presumption of correct action in favor of the trial judge is overcome by relators." *State ex rel. Less v. O'Brien*, 814 S.W.2d 2, 3 (Mo. App. E.D. 1991).

Relators have failed to satisfy this burden in their Petition and supporting Brief. Relators essentially appeal the denial of their motions to dismiss, for summary judgment,

and for judgment on the pleadings seeking to bar Investors Title from proceeding on Count I of this case. [Relators' Brief at pp. 5-7] However, Counts V, VI, and VII of the Amended Petition, stating claims against Relators under the federal Civil Rights Acts, 42 U.S.C. §1983, remain pending and must be tried regardless of any decision by this or any other court as to whether Count I is barred by sovereign immunity. [Relators' Brief at pp. 6, 10] Accordingly, if Investors Title prevails at trial on Counts V, VI, or VII, the issue of sovereign immunity as to Count I may become moot, and thus may never ripen into an issue that needs to be resolved at any time after trial of this case.

Under these circumstances, a writ of prohibition should not issue. This case is similar to *O'Brien*, 814 SW. 2d. 2, 3 (Mo. App. E.D. 1991), in which the Eastern District Court of Appeals quashed a preliminary writ of prohibition because the granting of the writ would not have precluded a trial on the merits. In *O'Brien*, the Plaintiff had brought a two count malicious prosecution suit against relators in the Circuit Court of St. Louis County. *Id.* The relators filed an answer to the first count, and then filed a motion to dismiss the second count which was subsequently denied by the trial court. *Id.* The relators then filed a petition for a writ of prohibition in the court of appeals, requesting entry of a writ prohibiting the trial court from proceeding as to the second count. *Id.*

After reviewing the various standards for applying the writ, the court of appeals determined that no writ should issue because issuance of the writ would not preclude a trial on the merits. *Id.* In its analysis, the court in *O'Brien* stated as follows:

Although this issue [of denial of the motion to dismiss] may escape this

> court's attention for some time until raised on appeal, it would only be a correctable misapplication of law. Moreover, relators will not suffer considerable hardship and expense because the issues they are seeking to avoid litigating under Count II, the fraud allegations, will still be litigated in Count I. ... This is not a peculiarly limited situation where irreparable harm will come to relators because the same issues will be litigated in Count I irrespective of whether the writ is issued.

Id.

The case before this Court is virtually on all fours with the facts and procedural situation at play in *O'Brien*. Regardless of the outcome of any decision on the Writ by this Court, Relators must proceed to trial on the remaining causes of actions because the claim challenged in Relators' Petition, Count I, concerns facts which are inextricably woven with those remaining claims pled in Counts V, VI and VII. [Brief of Attorney General of Missouri as Amicus Curiae in Support of Relators ("Amicus Brief") at p. 5] Therefore, allowing the trial court's order to stand – *i.e.*, permitting Count I to be tried with Counts V, VI and VII – will not cause Relators any undue hardship or insulate them from a trial for which they would not otherwise have to suffer. Accordingly, the requested Writ should not be granted.

The cases cited by Relators in their Brief do not dictate a different result. In each of those cases, sovereign immunity in fact barred <u>all</u> claims raised against at least one Defendant. Thus, a decision by an appellate court to issue a writ of prohibition on the issue

of sovereign immunity would have prevented at least one Defendant from going to trial on any claim. *See, e.g., State ex rel. Division of Motor Carriers & R.R. Safety v. Russell*, 91 S.W.3d 612, 614, 616 (Mo. banc 2002) (sovereign immunity barred all claims alleged against state Defendant); *State ex rel. Missouri Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 182 (Mo. banc 1985) (sovereign and official immunity barred all claims alleged against some, but not all, state Defendants); *State of Missouri ex rel. St. Louis State Hosp. v. Dowd*, 908 S.W.2d 738 (Mo. App. E.D. 1995) (sovereign immunity barred all claims against state Defendant). In contrast, any writ issued in this case will not prevent any Relator from proceeding to trial – all Relators will proceed to trial on Investors Title's three federal civil rights claims irregardless of this Court's resolution of Relators' Petition.

Furthermore, because Relators face a potential judgment on other claims, the issue of sovereign immunity may never need to be resolved – a judgment in favor of Investors Title on the remaining federal civil rights counts may render the issue presented by this Writ moot. Under such circumstances, a writ should be denied. *See State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218, 222 (Mo. banc 1998) (denying a writ of prohibition because a decision by the Missouri Gaming Commission may make the issue presented by the writ moot).

Finally, a decision by this Court on the single claim raised by Relators in their Petition will not even resolve the issue of sovereign immunity for this case. Investors Title has pled three state common law counts in which it specifically alleged that Relators

waived sovereign immunity through the purchase of insurance coverage. [Relators' App. at A11, A14-A17 (Amended Petition at Counts IV, VIII and IX)]. Respondent granted Relators' Motion for Summary Judgment on these Counts [Relators' App. at A22] – a ruling that Investors Title can only challenge on appeal. Therefore, in addition to not permitting to avoid preparation for and participation in a trial concerning the same factual issues [Amicus Brief at p. 5], granting the requested Writ will not prevent Relators from having to defend their claims of sovereign immunity on appeal.

As stated by this Court, prohibition "is not a writ of right and should not be employed for correction of alleged or anticipated judicial errors, and does not lie for grievances which may be adequately redressed in the ordinary course of judicial proceedings." *Kinsley*, 448 S.W.2d at 892. This rule is particularly applicable in this case. Relators will not avoid trial by the issuance of a writ of prohibition, while the sovereign immunity issue raised by this Writ may in fact become moot upon entry of judgment on the counts remaining for trial. Furthermore, the issue of sovereign immunity can be raised on appeal, at which time the appellate court can jointly address it and the other sovereign immunity issues raised by, or in defense to, the Amended Petition. Consideration of judicial discretion and economy dictate that in this case, as in virtually all other cases, the appellate courts of this state should confront the legal questions raised in the trial court only after a full and complete record has been established, a judgment rendered, and appropriate points of appeal presented.

B. **Prohibition Is Not Appropriate in this Case Because Relators Do Not**

Have Sovereign Immunity from Claims for the Refund of Fees Charged for Services Provided by a Governmental Entity.

In Count I of the Amended Petition, Investors Title alleged a claim for Declaratory Judgment and Common Law Refund, seeking to recover overpayments resulting from Relators charging Investors Title more than the statutorily-authorized fees for services rendered by Relators to Investors Title in conjunction with the filing and recording of documents with the Recorder's Office over a more than five year period. [Relators' App. at A7-A8] Deemed by the trial court to be an action contractual in nature, Relators argue that the claim of Investors Title in its Count I is barred by sovereign immunity. However, Relators arguments avoid the rulings of this Court and the other courts of appeal of this state concerning the ability of a person to pursue claims sounding in contract against state entities. Contrary to their assertions, the law of the State of Missouri has long recognized the ability of its citizens to sue the state for claims contractual in nature. Alternatively, the law of this state also recognizes the ability of persons to recover overpaid fees. Accordingly, Count I of the Amended Petition should be allowed to proceed to trial.

In *V.S. DiCarlo Constr. Co. v. State of Missouri,* 485 S.W.2d 52 (Mo. 1972) this Court held that sovereign immunity does not bar actions for breach of contract against the State. The Plaintiff in *DiCarlo* was a building contractor who had entered into a contract with the State to construct a building. The petition of the Plaintiff sought the recovery of monies for work performed under what appears to be both express and implied contractual

theories. *Id.* at 53[1]. In its ruling this Court analyzed case law from this and other jurisdictions to determine that when a state enters into a contractual relationship, sovereign immunity does not exist. As stated by this Court:

> 'In entering into the contract it [the State] laid aside its attributes as a

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[1]The claims raised by the plaintiff's petition were set forth by this Court as follows:

> Count I seeks recovery for extra compensation for rock excavation above the elevation at which the specifications stated rock would commence. This Count seeks to recover at the unit price specified in the contract for extra work excavation. Count II asserts an alternative ground of recovery for the same rock excavation. Count III complains of wrongful assessment of liquidated damages and seeks recovery of the balance of the contract price due but for the assessment of liquidated damages. Count IV seeks recovery for extra work which Plaintiff was required to perform but which it says was not its obligation under the contract. Count IV seeks recovery for the cost of some repairs resulting from acts by other contractors employed by the State. Count VI seeks recovery for extra expense caused by a change in sequence of the work directed by the State.

DiCarlo, 485 S.W. 2d at 53.

The statement of the claims appears to set forth only two, Counts I and III, as a breach of the original contract. Although not expressly stated, the other claims appear to be implied contractual theories upon which the plaintiff sought recovery.

> sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of the state when it enters into the ordinary business contract... The principle that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to anull or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its fate, since that invoke the manifest contradiction that the state is bound and yet not bound by its obligation'

Id. at 55 (quoting *Carr v. State ex. rel. Coetlosquet*, 127 Ind. 204, 26 N.E. 778 (1891)).

This Court then rejected the argument that the State of Missouri must explicitly waive immunity, holding that such a waiver would be found in the give and take of a business transaction. In finding that the mere allocation of funds to construct the building constitutes an adequate waiver, the Court stated that in such a situation the "waiver is implied rather than express because the nature of the transaction authorized necessarily contemplates mutual and reciprocal obligations on the part of the citizens and the State..." *Id. at 56*. Thus, this Court has expressly recognized that a transaction involving mutual obligations by a state entity creates an implicit waiver of sovereign immunity.

Such are the facts of this case. The transactions between Investors Title and Relators clearly create the type of mutual and reciprocal obligations constituting at least an implicit waiver of sovereign immunity by Relators. The Recorder of Deeds provides a service and Investors Title pays a fee for the provision of that service. [Relators' App. at A2-A3, A7; Relators' Brief at p. 4] Relators foresaw this mutual relationship, for it provided for refunds of overpayment. [Relators' App. at A3, A5] Furthermore, Relators established an "open account" system under which it required title companies such as Investors Title to essentially pre-pay its recording fees. [Relators' App. at A3-A6, A7-A8] The concept of enforcement of the mutual obligations arising from these transactions is inherent and it is obvious. In fact, there would be no doubt that Relators could pursue claims against Investors Title or other persons for non-payment following the performance of Relators' services. Similarly, Investors Title should be entitled to pursue a claim seeking a refund of any overpayment for the services provided. Relators recognize such obligation to refund overpayment because they regularly refund overpayment of fees to the users of its services. [Relators' App. at A3, A14].

Following the law established by the Court in *DiCarlo*, the courts of appeal of this state have applied its doctrines to finding a waiver of sovereign immunity through contracts implied at law. In *Gavan v. Madison Memorial Hospital*, 700 S.W.2d. 124 (Mo. App. E.D. 1985), an employee of a state operated hospital sued the hospital on various contractual and tort law theories. The court of appeals held that a personnel and procedures manual, combined with a statement that a person's employment will be governed by the policy

stated in the manual, created an implied contract upon which the plaintiff could sue for breach. *Id.* at 126-27. Finding this implied contract, the court then held that sovereign immunity did not apply. Relying upon this Court's decision in *DiCarlo*, the Court of Appeals stated: "[T]he doctrine of sovereign immunity... [has] no application to suits for breach of contract." *Id.* at 126.

Palo v. Stangler, 943 S.W.2d 683, 685 (Mo. App. E.D. 1997) then applied the rule stated in *DiCarlo* to a claim for money had and received. In *Palo*, the plaintiff sued the State of Missouri and various department heads seeking "reimbursement of an amount of court-ordered child support, which defendants collected [during a time period] pursuant to a withholding order served upon plaintiff's employer and which exceeded the amount of child support [plaintiff] allegedly owed during that time period." *Id*. at 684. In defense, the state defendants affirmatively asserted that the doctrine of sovereign immunity precluded any finding of liability for reimbursement of the overcharges to the Plaintiff for child support. *Id*.

The Eastern District Court of Appeals rejected the state's sovereign immunity defense. The court first noted that an action for money had and received "sounds in contract." *Id*. at 685. (See also *Hilderbrand v. Anderson*, 270 S.W.2d 406, 410 (Mo. App. 1954)(an action for money had and received "always sounds in contract")). Accordingly, because "the doctrine of sovereign immunity ... has no application to suits for breach of contract," the court of appeals held that the "doctrine of sovereign immunity did not operate to bar plaintiff's action for money had and received against [the state]." *Id.;*

See also Karpierz v. Easley, 31 S.W.3d 505, 511 (Mo. App. 2000).

This Court's decision in *DiCarlo* clearly articulated that actions sounding in contract are not barred by sovereign immunity. *Gavin, Palo,* and the trial court in this case merely applied this Court's rulings in *DiCarlo* to contractual relations. As stated by *DiCarlo*, when state entities enter into such contracts, whatever immunity exists is waived. Accordingly, Count I of the Amended Petition of Investors Title should be allowed to proceed.

In their arguments Relators primarily rely upon two cases from this Court, *Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-48 (Mo. 1962), and *Kleban v. Morris*, 247, S.W.2d 832, 837 (Mo. 1952), for the proposition that "[t]his Court has unequivocally stated that the doctrine of sovereign immunity applies to actions for money had and received", and for the proposition that sovereign immunity "rests upon grounds of public policy." [Relators' Brief at p. 9] These cases are distinguishable on a number of grounds. First, both pre-date this Court's decision in *DiCarlo*. Second, neither involve relations sounding in contract between a person and the State, but rather the refund of taxes. Finally, Relators generalization ignores well-established Missouri case law that distinguishes between claims seeking refunds of improperly or illegally collected "fees" and requests for "tax" refunds. *See infra* at pp. *19-23*. Thus, neither of these cases support Relators arguments.

As Investors Title has pled in its Amended Petition facts showing the establishment of mutual and reciprocal obligations between it and Relators, the Respondent was correct in

holding that Count I sounding in contract should proceed.[2] The preliminary writ denied by this Court should therefore be quashed.

In addition to the waiver by virtue of a relationship sounding in contract, this Court has also held that the doctrine of sovereign immunity does not bar a claim for overpaid fees. *Reidy Terminal v. Director of Revenue*, 898 S.W.2d 540, 543 (Mo. banc 1995). In *Reidy Terminal*, the plaintiff sought a refund of storage tank fees that had been imposed by statute. *Id*. at 540. The case originated in a proceeding before the Administrative Hearing Commission, which expressly ruled that the Department of Revenue had the authority to issue refunds of the fees improperly paid. *Id.* at 540-41. Although the sovereign immunity issue was not raised on appeal, this Court expressly affirmed the ruling, thereby holding that the refunds of such monies was not barred by the doctrine of sovereign immunity. *Id.* at 543.

Following *Reidy Terminal*, the Western District Court of Appeals in *River Fleets v. Carter*, 990 S.W.2d 75 (Mo. App. W.D. 1999), further extended the limitation upon sovereign immunity for actions to recover fees. In *River Fleets*, the Western District was

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[2]Relators also suggest that the Amended Petition of Investors Title fails to meet the requirements of §432.070 RSMo. Due to Investors Title's and Judge Vincent's reliance on *Palo*, Investors Title did not plead additional facts to meet this burden. If this court deems the pleadings inadequate on this or any other basis, rather than dismissal Investors Title requests a reward to allow it to re-plead facts to meet any new requirements established by this Court.

confronted with the issue of whether those persons seeking refunds of fees could collect interest on those fees. *Id.* at 76. Relying upon this Court's holding in *Reidy*, the court in *River Fleets* expressly held that the refund of fees was not barred by the doctrine of sovereign immunity, and further held that the doctrine of sovereign immunity also did not bar the payment of interest on such refunds. *Id.* at 76-78.

Relators suggest that public policy dictates that the recovery of fees should be barred from recovery similar to taxes. However, Relator's argument fails to recognize the distinction between taxes and fees. "Taxes are not payments for a special privilege or special service rendered" by government, but are instead "proportional contributions imposed by [government] upon individuals for the support of government and for all public needs." *Reidy Terminal v. Director of Revenue,* 898 S.W.2d 540, 542 (Mo. banc 1995)(citations and quotations omitted). Because "Government budgets are prepared on an annual cash basis" in reliance on the anticipated amount of taxes to be collected, proper government function dictates that governments must, in turn, be able to rely on the validity of such taxing statutes in order to prepare an accurate budget for the provision of general services to its constituents. *Community Federal Savings & Loan v. Director of Revenue,* 752 S.W.2d, 794 797 (Mo. 1988). Accordingly, to foster necessary government reliance to permit accurate government budgeting, "[p]ublic policy discourages suit for the refund of taxes erroneously paid or illegally collected." *Id.*

In contrast, "fees for service", unlike taxes, represent payments to government for specific services or benefits provided by government employees, and thus will vary

depending on the public demand for those specific services or benefits. *Reidy Terminal*, 898 S.W.2d at 542. As noted by courts, such "fees for services" are often not even placed in a government's "general fund for the support of government and all public needs, but, instead are deposited to the credit of [special trust funds]" that are limited to support of discreet, non-general government functions and purposes. *Id.* (quotations omitted). Relators cannot credibly contend that they rely on a flow of unknown funds resulting from fees for services, much less on fees that have severely restricted and permitted uses, in creating their general budget "for the support of all government needs and all public needs."

Missouri law also identifies two distinct types of government funds: "state funds", which are deposited into the general state treasury to be expended for the support of government and for all public needs; and "nonstate funds", which are deposited in discrete funds to be expended for, or on behalf of, expressly identified and limited purposes. *River Fleets*, 990 S.W.2d at 77; *Reidy Terminal*, 898 S.W.2d at 542. While sovereign immunity does apply to claims for refunds of "state funds", sovereign immunity does not bar claims for refunds of "nonstate funds" because a return of those monies would not implicate state interests of the type shielded by sovereign immunity since state functions are not being deprived of those funds. *River Fleets*, 990 s.W.2d at 78-79; *Rees Oil Co. v. Director of Revenue*, 992 S.W.2d 354, 358 (Mo App 1999)("Because the money in the PSTIF is not a state fund, we conclude that sovereign immunity does not apply").

Just as in the *River Fleets* and *Rees Oil Co.* cases, the monies here in issue are "nonstate funds". In addition to being fees for services, the monies that are paid by

Investors Title and other for services rendered by the Recorder's Office are governed by several different statutory and constitutional provisions that specify where those monies are to be deposited, and how they are to be held. These statutes in fact dictate that the vast majority of funds collected by the Recorder are not deposited into the general state treasury, but are either deposited in various specific trust accounts, separate funds, specifically maintained in the County treasury, or are segregated within the State treasury for nonstate fund type purposes. The statutory provisions authorizing these various charges thus dictate that the funds so collected are "nonstate funds" within the meaning of our Constitution, Mo. Const. Art. IV, §15, and *River Fleets* and *Rees Oil Co.* *See, e.g.* §14.040 RSMo.; §50.1190 RSMo.; §59.227 RSMo..; §59.240 RSMo.; §59.310 RSMo.; §59.316 RSMo.; §59.319 RSMo.; §59.800 RSMo.; §67.626 RSMo.; §67.1063-64 RSMo.; §109.221 RSMo.; §143.902 RSMo.; §144.380 RSMo.; §215.034 RSMo.; §247.370 RSMo.; §357.070 RSMo.; §417.260 RSMo.; §451.151 RSMo.; §488.445 RSMo. (each statute notes that the vast majority of the amounts charged by a county for recording various items are placed in specified trusts, accounts, or the County treasury, and are not deposited in or available to the state treasury, or are placed only in segregated accounts within the state treasury reachable for only specified purposes). *See also*, Mo. Const. Art. IV, §15.

Thus, as held by the Missouri Supreme Court in *Reidy Terminal*, and followed by the Western District in *River Fleets*, a refund of the overpayment, or improper payment, of fees for services is not barred by the doctrine of sovereign immunity. *Reidy Terminal*, 898

S.W.2d at 543; *River Fleets*, 990 S.W.2d at 76. Accordingly, Relators request for and the Writ should not be made permanent.

C. **Prohibition Is Not Appropriate in this Case Because, Assuming, Arguendo, That this Court Finds That Sovereign Immunity Currently Bars Count I of Investors Title's First Amended Petition, this Court Should Abrogate That Judicially-created Doctrine with Respect to Claims for Refunds of Overpayments Fees Paid for Services Provided by Governmental Entities Because the Policy Rationales Originally Supporting the Creation of Such Immunity No Longer Apply.**

"Sovereign immunity is a judicial doctrine that precludes bringing suit against the government without its consent." *State ex rel. Division of Motor Carrier & Road Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. banc 2002). Applying this core legal doctrine, this Court abrogated the doctrine of sovereign as it applied to tort claims in *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 230 (Mo. banc 1977). In its ruling, this Court noted that "[t]here remains the matter of immunity from suit, usually stated in terms of the sovereign not being liable to be sued without its consent," but issued no holding as to the continuing validity of such immunity because that "problem [was] not present, however, in the instant case or companion cases." *Id.* While the Missouri Legislature overturned the *Jones* holding by statute, that legislation, like this Court's holding in *Jones*, was specifically limited to sovereign immunity for tort actions. *See* §537.600.1 RSMo.

If this Court reaches the merits of Relators' Writ (s*ee* §IA, *supra*), *Di Carlo* sets forth the principle that guides resolution of the Relators' Writ (*see* §IB, *supra*). Assuming, however, that this Court finds that sovereign immunity sovereign immunity currently bars Count I, this Court should abrogate that judicially-created doctrine with respect to claims for refunds of overpayments fees paid for services provided by governmental entities because the policy rationales originally supporting the creation of such immunity no longer apply.

In *Jones*, this Court adopted the views set forth in "the dissent of Finch, J., filed in *O'Dell v. School Dist. of Independence*, 521 S.W.2d 403, 409 (Mo. banc 1975), which thoroughly discusses the doctrine and the reasons for its abandonment," as the basis for its abrogation of the sovereign immunity in tort. *Jones*, 557 S.W.2d at 228. In his dissent in *O'Dell*, Judge Finch "examined and refuted" the "[s]ix reasons offered by English common law and Missouri cases to justify the existence of the doctrine." *Jones*, 557 S.W.2d at 228. As was the case with sovereign immunity in tort, those reasons no longer justify granting immunity (assuming it exists) from claims for refunds of overpayments of fees paid for services provided by a governmental entity.

As Judge Finch noted in his *O'Dell* dissent,

> The first justification advanced ... for denying a right to recover for negligence was that since the county was not incorporated and there were no corporate funds available, such suits would be against members of the public individually. [Courts] stated that one or two would have to pay and they then

would sue other inhabitants to seek contribution, resulting in great inconvenience to the public.

O'Dell 521 S.W.2d at 414 (Finch, J., dissenting). As Judge Finch noted, this justification no longer applies because

> Whatever validity this argument had originally has now disappeared. School districts, counties, municipalities and other governmental entities in Missouri are corporations or quasi-corporations and do have corporate funds. Suits to recover from the governmental body would be against it and not be against all the citizens individually. There would not be the suits for contribution which the court said would cause inconvenience.

Id.

Similarly, the second justification no longer has merit. As Judge Finch stated,

> A second reason stated ... was that an action for individual injury should not be sustainable against the public because it is better that an individual should sustain and bear an injury than that the public should suffer an inconvenience. This philosophical viewpoint may have been a valid reason at that time in England, but I suggest that it is completely out of tune with present day concepts in this country and is not an acceptable justification for the rule. That kind of a standard would mean that one negligently injured while in a church should not recover from the church because it would be better for the individual to bear the loss than to impose it on the entire

congregation. We have rejected this philosophy.

Id.

A third basis cited in support of the doctrine, “the old concept that the king could do no wrong”, also no longer applies in this modern day. As Judge Finch noted, proponents of this basis

> necessarily assume that present day governmental entities inherited the king's immunity based on infallibility. So much has been written to discredit this justification for the doctrine that little more need be said. The Supreme Court of Illinois appropriately wrote, in *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11, 163 N.E.2d 89, 94 (1959): "We are of the opinion that school district immunity cannot be justified on this theory. As was stated by one court, 'The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.' *Barker v.*

City of Santa Fe, 47 N.M. 85, 136 P.2d 480, 482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."

O'Dell, 521 S.W.2d at 414-15 (Finch, J., dissenting). As this Court held in *Jones* with respect to sovereign immunity in tort, the discredited ancient doctrine that the "King can do no harm" no longer has any application in this day and age, and thus cannot justify protecting a modern governmental entity from suit.

A fourth justification examined and rejected by Judge Finch in *O'Dell* and this Court in *Jones* was "that public officers are without authority to bind the sovereign without constitutional or statutory authorization." *Jones*, 557 S.W.2d at 228; *O'Dell*, 521 S.W.2d at 415. As this Court cogently noted in *Jones*, such rationale no longer applies because "government should have both the benefits of its agents' and employees' acts and the responsibility of them." *Jones*, 557 S.W.2d at 229. As this Court stated in *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 603 (Mo. banc 1969), "immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution."

The fifth justification for sovereign immunity also no longer supports its continued application. This justification, known as the "trust fund theory" is premised on the proposition "that money which is appropriated to various governmental units is allocated to special purposes for which the funds are held in trust and that to use them to satisfy tort judgments would violate the trust." *Jones*, 557 S.W.2d at 229. However, as this Court

noted in *Jones*, "the rationale of this theory relates to satisfaction of a judgment, not with whether there is or should be a cause of action. It does not provide a sound basis for maintaining the doctrine of sovereign immunity." *Id.*

The final justification stated for retention of the doctrine of sovereign immunity is "that, without the doctrine, the financial stability of government will be threatened and the proper performance of government functions will be impaired." *Id.* In *Jones*, this Court adopted the "two fold" response set forth in Judge Finch's *O'Dell* dissent. *Id.* First, this Court held that taking responsibility for conduct was proper purpose of government. *Id.* This Court also adopted Judge Finch's reasoning that

> there is no empirical data demonstrating that the abrogation of the doctrine will substantially impair the financial stability of government to such an extent that there will be interference with the performance of governmental functions. ... Continuation of the doctrine is not justified on the basis that financial stability of government will be threatened or proper performance of its functions impaired.

Id.

As the rationale underlying judicial adoption of sovereign immunity no longer applies to suits seeking to recover overpayments of fees paid for services provided by governmental entities, this Court should abrogate the doctrine as it applies to such claims. The facts of this case amply displays why this doctrine should no longer apply. Relators supply a service for which it charges a fee. Relators dictate the manner in which it provided

the service, including requiring what was essentially pre-payment for the service. Relators then do not adequately supervise their own employee, thus allowing them to receive a windfall of several hundred thousand dollars. Allowing sovereign immunity to bar this claim therefore perpetuates the "rotten foundation" that the "King can do no wrong", and insulates Relators from liability for this failure to supervise their employees. Such an outcome should not be countenanced by the law of this State.

Accordingly, this Court should hold that sovereign immunity does not bar Investors Title's claims in Count I, and remand this case for trial on those and the remaining claims in the Amended Petition.

CONCLUSION

For these reasons, Respondent, The Honorable David L. Vincent, III, respectfully requests that the Preliminary Writ in Prohibition be quashed, and for all other relief this Court deems just.

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CERTIFICATE OF SERVICE

A copy of the foregoing was hand-delivered this 23rd day of April, 2004, to: The Hon. David Lee Vincent, III, Circuit Judge, Division 9, Courts Building, 7900 Carondelet, St. Louis, MO 63105, fax (314) 615-8280 (Respondent); and Cynthia L. Hoemann, Associate County Counselor, 41 South Central Avenue, St. Louis, Missouri 63105, fax (314) 615-3732 (attorneys for Relators).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies requirements of Rule 84.06, and that based on a word and line count under WordPerfect 10, this brief contains 7,271 words and 653 lines.

I also certify that the computer diskette that I am providing has been scanned for viruses under Norton Antivirus, version 7.5, and has been found to be virus free.

_____

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